my first to include the State Board. Although all three actions centered around the City Board's refusal to permit me to seek office as a write-in candidate, there were important differences between them.

My first action, 94 Civ 0013 (SS), concerned a local primary and election in only one year, 1993. Hon. Judge Sotomayor dismissed my complaint in 1996, ruling that I was unable to prove that my rights were violated deliberately. However, in an earlier Opinion and Order, dated March 24, 1995, the Court had denied a motion to dismiss, suggesting the defendants consider a 1963 Opinion from the New York State Attorney General's office which seemed to support my claim.[1]

My second action, 97 Civ 9404 (RMB), the pattern of continuing denial of my right to participate in contested primaries as a write-in candidate and voter leading up to the September 1997 Democratic Primary for Bronx Borough President. Although Hon. Judge Berman dismissed this complaint in September 1999, we appealed. In order to determine meaning of the relevant state law, the Second Circuit sent a certified question to the New York State Court of Appeals.

In their brief to the New York State Court of Appeals, dated January 4, 2001[2] , the City Board admitted that their policy regarding write-in voting in contested primaries had been wrong for over 40 years, making a ruling by the New York State Court of Appeals unnecessary. As a result, the Second Circuit vacated Hon. Judge Berman dismissal and we infact went to trial in July 2001. That I lost the trial is irrelevant to my current case.

[1] A copy of this Opinion and Order appears in Appellant's Court of Appeals Appendix at A45-A70.

[2] A copy of their brief appears in Appellant's Court of Appeals Appendix at A71-A81.

My current action concerns my attempt to run in the September 2000 Democratic Primary for the office of United States Senator. Although this action was begun before the defendants admitted that their interpretation of relevant NYS Election Law had been wrong for over 40 years, this case is significantly different inorder to warrant a different outcome.

At the time this action was initiated, both the City Board and the State Board were aware that all qualifying petitions for statewide office are filed with the State Board, not with the City Board. Further, both parties knew at that time, that the State Board did not require an additional opportunity to ballot petition before offering write-in voting in a contested primary. Clearly, the City Board had no authority to insist that a petition was necessary in a primary over which they had no jurisdiction.

The Court was in error when my complaint was dismissed and the Second Circuit was in error when my appeal was denied. My current action is sufficiently different from my two earlier actions to merit a trial to determine whether the defendants are infact culpable. We should be permitted to go trial and present our case to a jury as we were permitted to do after Hon. Judge Berman's 1999 dismissal was reversed in 2001.

REASONS FOR GRANTING THE PETITION

I. The decision of the Second Circuit conflicts with this Court's decision in *U.S. V. CLASSIC*, 313 U.S. 299.

A. In *U.S. V. CLASSIC*, 313 U.S. 299 (1941), the Supreme Court held that:

> [T]he right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution ... The alleged acts of

> appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the [313 U.S. 299, 326] ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law. Ex parte Virginia, 100 U.S. 339 , 346.

In determined that the Federal Courts have jurisdiction in federal elections and primaries for Congress and U.S. Senate, the Supreme Court also found that among rights and privileges secured by the Constitution and Laws of the United States, are:

(1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice;

(2) the right of the candidates to run for the office of Congressman and Senator and to have the votes in favor of their nomination counted as cast;

(3) the protection of these rights from violations under color of law; and

(4) where State Law provides for write-in voting, that too is protected by the Constitution and Laws of the United States.

Because the primary in this action is the September 12, 2000 Democratic Primary for the Federal office of U. S. Senator our right to participate as a write-in candidate was protected.

B. When in its September 29, 2005 Summary Order (A1-A5), the Second Circuit cites *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1,8 (1944) stating:

> "[U]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'"The "determinative threshold question" is thus whether the actions of City Board and its Commissioners were "intentional." *Shannon v. Jacobowitz*, 394 F.3d 90, 93 (2d Cir. 2005).(A3)

We can show that the defendants were aware at the time we requested injunctive relief in August of 2000, that they were acting outside their legal authority when they made their "erroneous" interpretation.

> The Second Circuit was mistaken when it said: [P]laintiff asserts that City Board's delay in changing its legal position on write-in voting constitutes a "willful and deliberate choice" to deny plaintiff his right to seek public office and his right to cast a write-in vote. However, while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation, plaintiff cannot establish that defendants intentionally chose this erronous interpretation *for the purpose of discriminating against write-in voters*.(A3-A4)

In discussing the Due Process and Equal Protection elements of my complaint, Magistrate Eaton stated that "It is undisputed that the City knew all along that its interpretation differed from the State's." (A41-A42)

Clearly, this means that the City Board knew at the time we filed for injunctive relief in August 2000, CV 00 4964 (RR), that the State Board did not require the opportunity to ballot petition the City Board claimed was necessary. The City Board also knew that according to NYS Election Law § 6-144, petitions for statewide office are filed with the State Board, not with the City Board.

When the City Board's insisted, in 2000, that write-in voting would not be offered, absent an "opportunity to ballot" petition, they were not saying that said petition had to be filed with the City Board, but rarher with the State Board even though the State Board did not require it. They were clearly acting under color of law, 42 § 1983.

II. The decision of the Second Circuit conflicts with an earlier ruling by the Second Circuit in *Williams v. Salerno*, 792 F.2d. 323, 326 (2d Cir. 1986)

In *Williams*, the Second Circuit had found that irreparable harm is established if a party is deprived of the right to vote (noting that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon"). In addition to having been denied my legal right to vote by write-in, we were also denied our right to participate as a candidate. While the defendants admitted, in 2001, that their interpretation of relevant election law had been wrong for over 40 years, the harm had been done and cannot be undone.

III. The Second Circuit's support of the District Court's ruling is in conflict with this Court's rulings in both *Monell v. Department of Social Services*, 436 U.S. 658, 98 Sup.Ct. 2018 (1978) and in *Pembaur v. City of Cincinnati*, 106 Sup.Ct. 1292, 1300 (1986).

In *Monell*, the Supreme Court found that municipalities and public officials can be held accountable under 42 § 1983 for constitutional rights violations resulting from the department's official policy. In my case, my rights were violated by the official policy set by both the City Board with its commissioners and the State Board with its commissioners.

In *Pembaur*, the Supreme Court found that liability under 42 § 1983 could be imposed on officials who were responsible for establishing the "final" official policy with respect to the activity in question. The Court noted that municipal liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question. *Pembaur* is also significant because it shows that liability can attach to even a single decision to take unlawful action in accordance with official policy set by even a single policy maker.

At the time we began this action, in August of 2000, the defendants were presented with two distinct choices. First, they could have complied with their obligation under NYS Election Law and granted me the less than three weeks that remained before the then upcomming September 12, 2000 primary, thereby avoiding this action. Or, second, they could continue their official policy whereby misinterpreting NYS Election Law they continue to deny me my legal right to seek public office as a write-in candidate. By choosing the second, they confirmed their official policy.

In accepting the lower court's ruling, the Second Circuit makes no determination as to the merits of the "color of law" issue that lies at the heart of my § 1983 action. If the City Board and its menbers knew that "opportunity to ballot" petitions are filed with the State Board and if we can show that they knew that State Board did not require these petitions in an already contested primary, then we can establish that their official policy was under of "color of law" and in deliberate violation of our constitutionally protected right to vote and to seek public office.

IV. Our Due Process Claim against the City Board should stand.

The Second Circuit says

"Similarly, "the due process clause is implicated by intentional state action." *Shannon*, 394 F.3d at 97 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)."[T]he due process clause . . .offer[s] no guarantee against errors in the administration of an election." *Powell*, 436 F.2d at 88. Plaintiff asserts that "City Commissioners deliberately denied to me and to other [D]emocratic voters our legal right to vote by write-in." However, as the magistrate judge pointed out, "although the Board of Elections' interpretation of New York Election Law was erroneous, it was rational, and clearly not arrived at with the intent to deprive any one person of the right to vote." Consequently, plaintiff's due process claims against City Board and its Commissioners must also fail. (A4)

Since it is agreed that in 2000, the defendants were presented with two options, one being to comply with their legal obligation and permit me to run as a write-in candidate, and the other being the continued their official policy of not providing write-in voting in contested primaries, absent an "opportunity to ballot" petition. They chose the latter.

If the defendants' actions and omissions were rational as the magistrate judge claims, then their misinterpretation of New York Election Law was merely erroneous and the due process claims against the City Board and its Commissioners should fail.

The question that needs to be addressed then is: Was their conduct rational? The answer clearly is no.

In discussing a memo from the New York City

Campaign Finance Board, Magistrate Eaton offered the following:

> [T]here is no evidence that any of the defendants saw this memo. Moreover, it does not reflect any awareness of Gelb, or any intent to deprive anyone else from running as a write-in candidate. It does reflect the discrepancy between the State and City practices, but that discrepancy has never been in dispute. The dispute is over whether that discrepancy had a discriminatory effect or purpose; this memo does not bear on that issue at all. Thus, even if it were admissible, this memorandum does not help Gelb, as the party opposing a motion for summary judgment, to meet his burden to "show a genuine issue by presenting evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existance of that [required] element at trial." *Cornett v. Sheldon*, 894 F.Supp. 715, 724, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986) (emphasis added).(A33)

By acknowledging that there is a discrepancy in the interpretation of relevant election law between the State Board and the City Board, Magistrate Eaton is acknowledging the fact that the State Board did not require an "opportunity to ballot" petition before permitting write-in voting in a contested statewide primary. Further, since any petitions for statewide office are filed with the State Board and not the City Board, has no authority in statewide primaries. Clearly, because the City Board knew that petitions for statewide office are filed with only with the State Board, and they knew that the State Board did not require an "opportunity to ballot" petition before permitting

write-in voting in a contested statewide primary, the City Board's decision to withhold the access to write-in voting in the September 2000 Democratic Primary for U.S. Senator was not rationally arrived at. Their misinterpretation of the relevant election law was not merely erroneous and should not be excused.

Regarding my appeal from the ruling in my previous action, 97 Civ 9404(RMB), the Second Circuit has said " In light of the repeated refusals of the City Board to afford Gelb (and others) write-in voting privileges in primary elections, it may well be that the Board engaged in arbitrary, purposeful and intentional discrimination. This does not appear to be a case of mere 'unintended irregularities.' *Gold*, 101 F.3d at 800.[3] "(A40) As a result of the Second Circuit's ruling, Judge Berman's order was vacated and we went to trial. That I lost the trial is irrelevant.

While the issues in my current case are similar to my previous actions, there is one significant difference. The office in question is statewide, not local. The City Board's conduct cannot be excused as mere error when it can be shown that they had no right to make any determination. We are entitled to present our facts at trial.

Our Due Process Claim should stand.

V. Our Equal Protection Claim against the City Board should stand.

The Second Circuit has basically accepted Magistrate Eaton's Report and Recommendation. In order to understand the Equal Protection claim against the City Board. The Magistrate says:

[3] *Gelb v. The Board of Elections of the City of New York, et al*, (2000) 2d Cir. Slip Opinion, pg. 5308 Appeals Appendix p.40

> [I]n order to establish any violation of Equal Protection Clause, Gelb must show that the City Board or the City Commissioners' conduct was "purposeful" -- purposeful in the sense that they intended to discriminate against Gelb or a class of persons of which Gelb is a member. See *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401 (1944) ("the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."); *Gold v. Feinberg*, 101 F.3d 796, 798 (2d Cir. 1996), citing *Powell v. Power*, 436 F. 2d 84 (2d Cir. 1970) (A 30)

Can we demonstrate that an element of intentional or purposeful discrimination is present in the City Board's conduct complained of?

The defendants were aware that the Federal Office in question in the September 12, 2000 Democratic Primary was United States Senator, a statewide primary. They were aware that "opportunity to ballot" petitions for write-in voting for statewide office is filed with the State Board, not the City Board. Further, they were aware that since the primary in question was contested, the State Board did not require that an "opportunity to ballot" petition be filed before permitting write-in voting.

Since the City Board can not offer any legitimate justification for their "erroneous" interpretation of relevant election law, their conduct can only be seen as purposful in the sense that they intended to discriminate against my write-in candidacy in the September 12, 2000 Democratic Primary for United States Senator.

When the Second Circuit says

> [P]laintiff asserts that the City Board's delay in changing its legal position on write-in voting constitutes a ""willful and deliberate choice"" to deny plaintiff his right to seek public office and his right to cast a write-in vote. However, while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation, plaintiff cannot establish the defendants intentionally chose this erroneous interpretation *for the purpose of discriminating against write-in voters*."(emphasis included) (A 3)

the Court misapprehended the nature of my complaint. It is not the defendants' delay in changing their legal position on write-in voting that constitutes a "willful and deliberate choice."

Rather, there were two separate reasons that speak to their actions being willful and deliberate.

First, their refusal, under color of law, to respect my legal right to participate in the September 12, 2000 Democratic Primary for U. S. Senate constituted a "willful and deliberate choice." In August 2000, when I moved for injunctive relief to compel the City Board provide write-in voting, the City Board already knew that (1) primary petitions for the statewide race for U. S. Senate were filed with the State Board, not with the City Board; and (2) they also knew the State Board did not require an additional opportunity to ballot petition in a contested primary before offering write-in voting. Clearly, the City Board had no legal right to its own interpretation of relevant election law in a statewide race.

Second, when the City Board admitted in their 2001 brief to the New York State Court of Appeals (A71-A81),

that their policy regarding write-in voting in primaries had been wrong for over 40 years, they cited two reasons for their reversal. The City Board stated:

> ... The origin of the "opportunity to ballot petition" and the legislative history of Election Law sections 6-164 and 6-160(2) demonstrate that an opportunity to ballot petition is applicable only in uncontested primaries where, but for the filing of an opportunity to ballot petition, no balloting would take place. Thus, in contested primaries where balloting will take place, write-in voting should be made available to enrolled party members.[4]

These two facts were not newly discovered by the defendants. Judge Sotomayor had suggested that the defendants consider these two items in her 1995 Opinion and Order in my first complaint, 94 Civ. 0013(SS) (Appeals Appendix p45-p70).

These two facts were not newly discovered by the defendants. Judge Sotomayor had suggested that the defendants consider these two items in her 1995 Opinion and Order in my first complaint, 94 Civ. 0013(SS) (Appeals Appendix p45-p70).

Further, that defendants' intent to discriminate against me as a write-in candidate can be seen in their misstatement of facts in "Defendant City Board of Elections' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction" CV-00-4964 (RR) (Appeals Appendix p87-p96). On page 4 of this Memorandum (Appeals Appendix p91), defendants make a number of false and misleading statements upon which the Court later relied.

[4] Respondents' Brief to NYS Court of Appeals, "Statement of Position" page 5, ¶2 (Appeals Appendix p.77)

1. Page 4, ¶2 (A91) begins: "Because of the number of political parties in New York State and the number of public offices and party positions ordinarily at stake in a primary election, the voting machines utilized by the City Board of Elections are not capable of providing write-in slots for every office and position in a typical primary, such as the one which will be held on September 12, 2000."

This statement is misleading and false for the following reasons:

If the voting machines were not capable, as the defendants claimed, of providing write-in slots for every office and position in a typical primary, then there would also be insufficient space on the ballot for the offices and party positions. NYC voting machines are designed for use in no more than four primaries. This can be seen in the excerpt from the Voting Machine Maintenance Manual, Section Eleven, page 1(Appeals Appendix p.137). The voting machines have eight columns that for primaries are connected in sets of two. There are 40 lines in each column and a corresponding 40 write-in slots. Since the voting machines were used in the September 12, 2000 primary, there was sufficient ballot space for all the public offices and party positions. The 40 write-in slots would have been sufficient.

Clearly, this statement was intended to mislead the Court.

2. Page 4, ¶2 (Appeals Appendix p.91) continues: "Even if the voting machines had such a capability, the ballots would have to be completely reconfigured to permit write-in voting for all public offices and party positions. Such a reconfiguration could not be performed without the rotation of the candidates being affected, which would result in a violation of Election Law §7-116(6)." This statement is

false and misleading because no reconfiguration was necessary. There is only one write-in slot available for *each office and each position* on the ballot. The number of candidates for each primary office or position and the order in which the candidates appear is irrelevant. Clearly this statement was also intended to mislead the Court.

3. The fact that the defendants would fabricate these two superficial and nonrational reasons for withholding my right to participate as a write-in candidate clearly illustrates their willful and deliberate intent. Their actions and omissions were not due to some rationally arrived at error.

Our Equal Protection claim is valid and should be permitted to proceed.

VI. The injunctive relief requested should be granted because the annual modification of the N.Y.S. Election Law in order to permit the counting of write-in votes up to 15 days after the primary is another deliberate violation of Equal Protection.

In a primary where you have multiple (two or more) designated candidates for an office and an unknown number of write-in possibilities, if no candidate obtains a plurality of at least 40%, there will have to be a runoff primary between the two candidates with the highest number of votes. NYEL § 8-100(1)(b)

If one of the two candidates for the runoff were a write-in candidate, no one would be aware of this fact for up to 15 days. This would be further complicated by the fact that NYEL § 8-100(1)(b) states: "In the event a run-off primary election is required in the city of New York, it shall be held on the second Tuesday next succeeding the date on which the initial primary election was held."

Conceivably, a write-in candidate as well as the qualified voters would not know that the write-in candidate

qualified for the run off until after it was held.

Also, the defendants failed to demonstrate any real need to change the location and time of the counting of the write-in ballots from public view, at the polls, to some warehouse 15 days later.

VII. The State Board violated my rights under Color of Law.

A. The following facts are not in dispute:

1. The elective office in question is the federal office of U. S. Senator.

2. The State Board was aware of the fact that designating petitions for statewide primaries are filed with the State Board, not with the City Board.

3. The State Board did not require an opportunity to ballot petition prior to permitting write-in voting in a contested statewide primary.

4. The State Board was aware of the City Board's claim that an opportunity to ballot petition was required prior to permitting write-in voting even in a contested statewide primary.

B. On page 2, ¶2 of its "Memorandum of Law in support of Defendant, State Board's Motion for Judgment on the Pleadings", dated April 24, 2001 (A100), defendants say "...The State Board administers the access to the ballot for statewide office. Election Law §6-144." They clearly avoided their administrative responsibility in 2000.

When we began this action in the Eastern District as "CV 00 4964"(RR) (A82-A86) the State had a responsibility to inform the Court that the City Board had no legal right to claim an opportunity to ballot petition was necessary in a statewide race.

They ignored their obligation, thereby causing irreparable harm and violating my rights under color of law.

VIII. For the purposes of my action, the City Board and its Commissioners and the State Board and its Commissioners are joint tortfeasors and are both jointly and severally liable for the injuries we suffered.

The Second Circuit was incorrect "In concluding that the actions of the City Board and its Commissioners did not violate the Equal Protection or Due Process Clauses, it follows that the inaction of the State Board and its Commissioners, in supervising their conduct, also did not violate these constitutional provisions. See *Bass v. Jackson* 790 F.2d 260, 263(2d Cir. 1986) (affirming dismissal of § 1983 claim despite "allegations of deliberate indifference" because *pro se* plaintiff "does not connect the failure to [act] to any of the ...defendants")" (A4)

Clearly, we did connect the actions and omissions to the various commissioners on the two Boards. When the City Board and the State Board set their policy, it was with the joint participation and consent of their respective Commissioners. No Commissioner on either Board was ever shown to be in disagreement with their Board's policy.

The City Board cannot show that their "erroneous" interpretation of New York Election Law was rationally arrived at and we can show that they were aware that they had no right to make any determination regarding a statewide race.

During our initial action in the Eastern District "CV 00 4964"(RR), the State Board had an opportunity to prevent the irreparable harm that ultimately occurred as a result of their failure to act.

While the Second Circuit correctly says "Because the states traditionally have authority over their own elections and because the Constitution contemplates that authority, courts have long recognized that not every state election

dispute implicates federal constitutional rights." *Shannon*, 394 F.3d at 94 (internal quotations omitted) (A4) the quotation is irrelevant because in *U. S. v. CLASSIC*, 313 U.S. 299 (1941) the Supreme Court determined that the Federal Courts have jurisdiction in federal elections and primaries for Congress and U.S. Senate.

Further, footnote 2, attached to the above quote says "Moreover, as plaintiff conceded in his reply brief, his claims against the State Board for monetary damages are barred under the Eleventh Amendment. *See Feingold v. New York*, 366 F.3d 138, 149(2d Cir.)" is correct only in part. We conceded only that the State is immune from damages.

The Commissioners, however, have no immunity because they were not acting on behalf of the State when under color of law, they supported the right of the City Board to interpret the relevant Election Law differently from the State Board in a statewide primary.

State officials can be sued for damages when acting in their "official capacity."*Hafer v. Melo* 112 Sup. Ct. 358 (1991) Further, in *Pembaur*, liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Irving A. Gelb
8800 Boulevard East, apt. 3M
North Bergen, New Jersey 07047
(646) 431-8999

March 7, 2006

(2)

Supreme Court, U.S.
FILED

051161 MAR 7 - 2006

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

IRVING A. GELB, Pro se
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APPENDIX A

United States Court of Appeals for the Second Circuit

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

File stamp: "UNITED STATES COURT OF APPEALS, Second Circuit, Filed SEPT. 29, 2005 Roseann B. MacKechnie Clerk"

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of September, two thousand and five.

Present: HON. ROGER J. MINER,
HON. RICHARD C. WESLEY
Circuit Judges.
HON. JED S. RAKOFF,
District Judge.[1]

IRVING A. GELB,

Plaintiff, Appellant

v. (05-1269-cv)

Board of Elections of the New York City , et al

[1] The Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, sitting by designation.

and

The New York State Board of Elections, et al

Defendants-Appellees

Appearing for Plaintiff-Appellant:	Irving A. Gelb, pro se, Bronx, New York
Appearing for Defendants-Appellees Board of Elections of the City of New York and its Commissioners:	Julie Steiner, Senior Counsel, Appeals Division, the City of New York Law Dept., New York, New York
Appearing for Defendants-Appellees Board of Elections of the State of New York and its Commissioners:	Todd D. Valentine, Special Counsel, New York State Board of Elections, Albany, New York.

Appeal from the United District Court for the Southern District of New York (Daniels,J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues. Plaintiff brings this section 1983 action alleging that defendants, Board of Elections of the City of New York ("City Board"), Board of Elections of the State of New York

("State Board"), individual commissioners of the City Board ("City Commissioners"), and individual commissioners of the State Board ("State Commissioners"), violated the Equal Protection and Due Process Clauses of the United States Constitution and committed fraud and ultra vires acts under New York state law. Plaintiff alleges that defendants committed these violations by denying him and other similarly situated voters the legal right to cast a write-in vote during the 2000 Democratic Primary for the United States Senator and by failing to provide information and instructions on write-in voting. Plaintiff also requests a mandatory injunction on the basis that defendants violated the Equal Protection Clause by failing to count write-in votes "at the polls" at the same time as other votes. The district court, adopting the recommendation of the magistrate judge, granted summary judgment for defendants and denied plaintiff's motion for a mandatory injunction. After conducting de novo review, we now affirm the district court's grant of summary judgment for defendants and its denial of injunctive relief.

"Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'" *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1,8 (1944). The "determinative threshold question" is thus whether the actions of City Board and its Commissioners were "intentional." Shannon v. Jacobowitz, 394 F.3d 90, 93 (2d Cir. 2005). Plaintiff asserts that City Board's delay in changing its legal position on write-in voting constitutes a "willful and deliberate choice" to deny plaintiff his right to seek public office and his right to cast a write-in vote. However, while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation,

plaintiff cannot establish that defendants intentionally chose this erronous interpretation *for the purpose of discriminating against write-in voters*. Plaintiff's claim for injunctive relief must also fail because, without demonstrating intentional discrimmination, plaintiff has failed to make "a clear showing that the moving party is entitled to the relief requested." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995).

Similarly, "the due process clause is implicated by intentional state action." *Shannon*, 394 F.3d at 97 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986). "[T]he due process clause . . .offer[s] no guarantee against errors in the administration of an election." *Powell*, 436 F.2d at 88. Plaintiff asserts that "City Commissioners deliberately denied to me and to other [D]emocratic voters our legal right to vote by write-in." However, as the magistrate judge pointed out, "although the Board of Elections' interpretation of New York Election Law was erroneous, it was rational, and clearly not arrived at with the intent to deprive any one person of the right to vote." Consequently, plaintiff's due process claims against City Board and its Commissioners must also fail.

In concluding that the actions of City Board and its Commissioners did not violate the Equal Protection or Due Process Clauses, it follows that the inaction of State Board and its Commissioners, in supervising their conduct, also did not violate these constitutional provisions. See *Bass v. Jackson*, 790 F.2d 260, 263 (2d. Cir. 1986) (affirming dismissal of section 1983 claim despite "allegation of deliberate indifference" because pro se plaintiff "does not connect the failure to [act] to any of the . . . defendants"). "Because the states traditionally have authority over their own elections and because the Constitution contemplates that

authority, courts have long recognized that not every state election dispute implicates federal constitutional rights." *Shannon*, 394 F.3d at 944 (internal quotations omitted.) [2]

Finally, we decline to exercise supplemental jurisdiction over plaintiff's fraud and ultra vires claims because all of plaintiff's federal claims have been dismissed. "[I]n the usual case in which all federal-inlaw claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness, and comity - will point toward declining to excercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee*, 316 F.3d,299, 305 (2d Cir. 2003) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). "Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *Castellano v. Bd. of Trs. of the Police Officers' Variable Supplements Fund*, 937 F.2d 752, 758 (2d Cir. 1991) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

Accordingly, for the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

For the Court, Roseanne B. MacKechnie, Clerk

s/ Lucille Carr

[2] Moreover, as plaintiff concedes in his reply brief, his claims against State Board for monetary damages are barred under the Eleventh Amendment. See Feingold v. New York, 366 F.3d 138, 149 (2d Cir. 2004).

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York 10007

Roseann B. MacKechnie
Clerk
file stamp: "UNITED STATES COURT OF APPEALS, Second Circuit, Filed December 8, 2005 Roseann B. MacKechnie Clerk"

Date:	12/5/05
Docket Number:	05-1269-cv
Short Title:	Gelb v. New York State Board of Elections
DC Docket Number:	00-cv-6325
DC:	SDNY (New York City)
DC Judge:	Honorable George Daniels

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall U.S. Courthouse, Foley Square, in the City of New York, on the 8th day of November two thousand five.

Gelb v. Board of Elections

A petition for a panel rehearing and a petition for rehearing en banc having been filed herein by the Irving A. Gelb Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
s/ Tracy W. Young
Motion Staff Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

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00 Civ. 6325 (GBD) (DFE)

REPORT AND RECOMMENDATION TO JUDGE DANIELS

DOUGLAS F. EATON, United States Magistrate Judge.

On February 24, 2004, pro se plaintiff Irving A. Gelb moved for a "Mandatory Injunction." (Docket Item #35.) Gelb asks our court to

> issue an ORDER requiring that the New York City Board of Elections (the Board) count at the polls all write-in votes cast in all primary and general elections starting with the September 2004 primary.

(Id., aff. at p.1; emphasis added.)

On March 10, Assistant Corporation Counsel Paul Marks served an opposing memorandum of law. On March 16, Gelb served a reply("Reply"). This motion is in furtherance of Gelb's third[1] law suit against the New York City Board of Elections, filed in 2000. All three lawsuits attacked the

[1] The first two actions were *Gelb v. Board of Elections in City of New York*, 950 F. Supp. 82 (S.D.N.Y. 1995), aff'd. 125 F.3d 843 (2d Cir. 1997) ("*Gelb I*") and *Gelb v. Board of Elections in City of New York*, 2002 WL 31018573 (2d Cir. Sept. 10, 2002) ("*Gelb II*").

Elections, filed in 2000. All three lawsuits attacked the City's practices regarding write-in voting, particularly in contested primary elections. The basic issue in all three cases has been whether or not the City is required to provide a mechanism for write-in voting even if no one has filed a petition for "opportunity to ballot." But in 2001 the City changed its position on this issue and its position is now consistent with Gelb's. See *Gelb v. Board of Elections of City of New York*, 2001 WL 327113 (2d Cir. April 4, 2001).

In his current motion, Gelb voices a different complaint. He alleges that counties outside the City count their write-in votes "at the polls," by which he means "at the poll sites and on the very night of the voting." (For the purposes of this motion, I will assume that this allegation is true.) He complains that the City counts its write-in votes several days later. He says the City's practice was contrary to the former version of New York State Election Law ("NYEL") § 9-102(2)(a), the version that existed prior to 2001. Starting in 2001, the New York State Legislature has enacted, each year, an amended version of § 9-102(2)(a), each time effective for one year. The present version reads as follows (with my emphasis):

> § 9-102 Canvass; general provisions for
>
> (2)(a) [Eff. until July 10, 2005 ...] If the voting machine records write-in votes on a register or roll in a separately sealed compartment, a board of elections may, by resolution adopted at least thirty days before the date of an election, determine to canvass the write-in votes cast for each office on the write-in register or roll either at the time of the recanvass conducted pursuant to section 9-208 of this article or ... at the close of the polls.

The statute gives each board of elections a choice as to the

time when it will count the write-in votes. If the City "chooses the time of the recanvass conducted pursuant to section 9-208," [2] then the City will simply be following the law of New York State.

Gelb claims that the Equal Protection Clause has been violated each time the Legislature has enacted the present version, and will be violated each time the City Board exercises its statutory option to canvass the write-in votes up to 15 days after the voting. Gelb writes:

> The changes to NYEL § 9-102(2)(a) as described by counsel are clearly in violation of Equal Protection because they grant to each board of election the option of either (1) canvassing write-in votes at the close of the polls; or (2) counting the write-in votes during the recanvass conducted pursuant to § 9-208. This means that the voters in some counties will know the the write-in vote on primary election night while those within New York City will need to wait eight days [or up to 15 days]. For the change to be fair, no vote count [not even the vote count for the candidates on the ballot] should be released until all votes are counted.

(Reply, p.2.) But § 9-102 gives all local boards of elections throughout New York State the same two alternatives -- it does not treat similarly situated groupes differently.

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[2] § 9-208 provides in pertinent part:

> 1. Within fifteen days after each general, special or primaary election ..., the board of elections ... shall in each county using voting machines, ... recanvass the vote thereon ... The said Board or committee shall during such time, make a recanvass of any absentee and military, ... emergency and write-in ballots which were canvassed at the polling places on election night and delivered to the board of elections by the person filing returns.